FOR ARGUMENT

Supreme Court, U. S.
FILED
FEB 23 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 75-1126

TRANSWORLD AIRLINES, INC.,
Petitioner

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650.
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Brief of Amicus Curiae State of Michigan

FRANK J. KELLEY
Attorney General of Michigan

Robert A. Derengoski
Solicitor General

Michael A. Lockman
Assistant Attorney General

Gary G. Kress
Assistant Attorney General

525 W. Ottawa
Law Building, 7th Floor
Lansing, Michigan 48913

Attorneys for the Amicus

Table of Contents

Page

Interest of the amicus curiae 1

Summary of argument 3

Argument

I Michigan has consistently enforced reasonable accommodation of employees' religious observances and this state's long history of leadership and expertise in the area is persuasive evidence of the validity of its conclusions regarding the reasonable accommodation requirement. 5

II True freedom of religion requires a reasonable accommodation of an employee's or prospective employee's religious observances or practices. 15

A. The United States has historically accorded equality of opportunity. 15

B. The even-handed application of work rules has a disproportionate effect on Sabbatarians which requires a reasonable accommodation to cure. . 17

C. The principles of statutory construction dictate that 42 USC § 2000e(j) be upheld. 18

1. A uniform system of jurisprudence as between the state and federal systems is required. ... 19

2. The Establishment Clause is not violated by an accommodation requirement. 20

III Reasonable accommodation requires no more than the same arrangements made to compensate for the absence of an employee for any reason. 25

Conclusion 27

Table of Authorities Cited

Cases.

Beech Grove Investment Co v *Civil Rights Commission*, 380 Mich 405; 157 NW2d 213 (1968) 12,13

City of Ypsilanti v *Civil Rights Commission*, 55 Mich App 103, 111; 221 NW2d 923 (1974) rev'd, 393 Mich 253; 227 NW2d 213 (1974) 13,14

Crowell v *Benson*, 285 US 22, 62 (1932) 20

Griggs v *Duke Power Co*, 401 US 424 (1971) 15,17

Groehn v *Corporation and Securities Commission*, 350 Mich 250; 86 NW2d 291 (1957) 8

Humphrey v *Southwestern Portland Cement Co*, 369 F Supp 832, 834 (WD Tex, 1973), rev'd on other grounds, 488 F2d 591 (5th Cir, 1974), reh den, 490 F2d 992 (5th Cir, 1974) 16

Lemon v *Kurtzman*, 403 US 602 (1971), reh den, 404 US 876 (1971) 24

Levitt v *Committee For Public Education & Religious Liberty*, 413 US 472 (1973) 24

Michigan Civil Rights Commission v *Clark*, 390 Mich 717, 212 NW2d 912 (1973) 13

Norwood v *Harrison*, 413 US 455 (1973) 24

School District of Abingdon Twp, Pa v *Schempp*, 374 US 203, 222 (1963) 22

Sherbert v *Verner*, 374 US 398 (1963) 17

Tilton v *Richardson*, 403 US 672 (1971) *reh den* 404 US 874 (1971) 24

United States of America v *Powers*, 307 US 214 (1938) 18,19

United States v *Thirty-Seven Photographs*, 402 US 363, 369 (1971) 20

Walz v *Tax Commission of the City of New York*, 397 US 664 (1970) 24

Zorach v *Clauson*, 343 US 306 (1952) 20,21

Constitutional Provisions

United States Constitution

Bill of Rights 9, 15, 16

Thirteenth Amendment 16

Fourteenth Amendment, §§ 1, 5 16

Fifteenth Amendment 16

Nineteenth Amendment 16

Twenty-Fourth Amendment 16

Twenty-Sixth Amendment 16

Michigan Constitution

Const 1835, art 1, §§ 1-4, 6-13, 15-21 9

Const 1835, art 11, § 1 9

Const 1850, art 4, §§ 39, 41-44 9

Const 1850, art 6, §§ 26-34 9

Const 1850, art 15, § 15 9

Const 1850, art 18, §§ 2, 7, 9-11, 14 9

Const 1908, art 2, §§ 2-5, 7-17, 19-21 9

Const 1908, art 3, § 1 9

Const 1908, art 11, § 9 9

Const 1908, art 13, §§ 1-3 9

Const 1963, art 1, §§ 1-6, 8-18, 20-22 10

Const 1963, art 2, § 1 10

Const 1963, art 4, § 46 10

Const 1963, art 5, § 29 6,10

Const 1963, art 8, §§ 2, 8 10

Const 1963, art 10, § 6 10

Statutes

Federal

Northwest Ordinance, 1787 US Rev Stat, 2d ed, 1878 p 13, art I, II, VI 9

2 US Stat, Ch XLI, pp 58-59 9

2 US Stat, Ch XLI, § 2 9

2 US Stat, Ch V, pp 309-310 9

2 US Stat, Ch V, § 2 9

5 US Stat At Large 144 9

5 US Stat At Large 59 9

Civil Rights Act of 1964, 42 USC § 2000e(j) (1972) 4, 13, 18, 19, 20, 26

42 USC § 2000e-2(a)(i) 13

42 USC §2000e-5(c), (d) 19

42 USC § 2000e-8(b) 20

State

1885 PA 130 § 2 10

1885 PA 130 § 3 10

CL 1915 §8418 10

Michigan State Fair Employment Practices Act, MCLA §423.301; MSA §17.458(1) 5

MCLA §423.303(a); MSA §17.458(3)(a) 6,11

MCLA §§750.146, 750.147; MSA §§28.343; 28.344 10

MCLA §§35.461; MSA §4.1251 10

MCLA §750.148; MSA §28.345 10

MCLA §750.147a; MSA §28.344(1) ..... .10

MCLA §423.303(e); MSA §17.458(3)(e) 11

Fair Housing Act of 1968, MCLA §564.101 et seq, 26.1300(101) et seq 11

Michigan Handicappers Civil Rights Act, MCLA §37.1101 et seq; MSA §3.550(101) et seq 11

1976 PA 453 11

Regulations and Interpretations

Interpretative Guidelines On Civil Rights Laws, 3 CCH Employment Practices Guide, ¶24,235(B)(7), p 8635-7 7

Interpretative Guidelines On Civil Rights Laws, 3 CCH Employment Practices Guide ¶24,235, p 8635-5 13

3 CCH Employment Practices Guide, ¶20,404, §41-1461.6, p 8128 14

3 CCH Employment Practices Guide, ¶21,063, p 8221-9 14

3 CCH Employment Practices Guide, ¶22,498, p 8418 . 14

3 CCH Employment Practices Guide, ¶23,079.01, §21-33-1(b), p 8503 14

3 CCH Employment Practices Guide, ¶23,203, §344.030(5), p 8519 14

3 CCH Employment Practices Guide, ¶23,830, p 8567 . 14

3 CCH Employment Practices Guide, ¶24,005, §4(1A), p 8586 14

3 CCH Employment Practices Guide, ¶26,007, §296.10(b), p 8890 14,15

3 CCH Employment Practices Guide, ¶26,620, p 8952 . 15

3 CCH Employment Practices Guide, ¶27,205A, pp 9027-9028 15

3 CCH Employment Practices Guide, ¶27,835.52, p 9145-9 15

29 CFR §1605 18

Opinions of the Attorney General of Michigan

OAG 1963-1964 No. 4161, pp 144-145 (July 22, 1963) .. 12

Miscellaneous

Michigan Department of Civil Rights, ex rel, Russell Taylor v *Ford Motor Co.* Wayne County Circuit Court Docket No. 76-601454-AA 7

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 75-1126

TRANS WORLD AIRLINES, INC.,

Petitioner

vs.

LARRY G. HARDISON, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT 142 and INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, LOCAL 1650,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

Brief of Amicus Curiae State of Michigan

INTEREST OF THE AMICUS CURIAE.

The State of Michigan through its Attorney General, as amicus curiae, in concurrence with the long-standing, publicly stated view of the Michigan Civil Rights Commission (CRC) respecting reasonable accommodation, submits this brief pursuant to Rule 42.4 of this Court.

The State of Michigan has been committed to the preservation of the civil rights of individuals from the time of the Northwest Ordinance, which Act contained substantial guarantees of individual freedom. Foremost among those rights was freedom of religion.

Michigan has had an extensive fair employment practices act since 1955, the enactment of which predated the passage of Title VII by nine years. That Act prohibited religious discrimination in employment and created a Civil Rights Commission (CRC) to enforce its provisions.

As a leader in the area of civil rights and individual freedoms Michigan has gone a step further than other state civil rights agencies. The CRC was created by Michigan's 1963 Constitution and was granted the power to secure equal protection of civil rights in Michigan. The amicus and the highest Court of this state have ruled the CRC to be free of judicial or legislative interference with respect to the performance of its designated functions. It is thus believed that Michigan's Civil Rights Commission is fully empowered to impose a reasonable accommodation requirement.

A further indication of Michigan's strong public policy regarding civil rights is reflected in the view of its Supreme Court that the CRC may look to federal law as a source of the civil rights it is charged with securing. One indication of the CRC's reliance on federal law was its September 26, 1972 adoption of the federal Equal Employment Opportunity Commission's religious accommodation guidelines of 1967. Both prior to and since that time its support staff has consistently sought to require reasonable accommodations to the religious needs of Michigan employees.

From the time the CRC determined to apply a reasonable accommodation requirement, it has been accepting complaints

of religious discrimination because of the failure of employers and unions to make reasonable accommodations to employee's religious needs. Four of these complaints were not otherwise administratively resolved and have been brought before the CRC for adjudication. In each, the finding has been for the complaining employee; specifically that the employer's failure to make a reasonable accommodation entailed unlawful religious discrimination under Michigan law. Three of these determinations have been taken to Michigan's circuit courts on appeal. One of these cases is substantially on all fours with the instant case.

It is thus readily apparent that the instant matter raises issues which potentially will have a significant impact on the hire, tenure, terms, conditions or privileges of employment in Michigan. The amicus further believes that the outcome of this litigation will be so pervasive as to greatly affect the state's efforts to eliminate religious discrimination in employment. An adverse decision herein will remove the persuasive authority of federal law which the CRC has so heavily relied upon in the area of religious accommodation.

For the above stated reasons, the amicus files this brief in support of respondent Hardison.

SUMMARY OF ARGUMENT

This case involves the question of whether employers and unions may constitutionally be required to make reasonable accommodations of the religious observances or practices of employees or prospective employees. Along with eleven other states, Michigan has adopted the Equal Employment Opportunity Commission's guidelines which require such accommodation and, through its constititutionally-established Civil Rights Commission. Michigan has consis-

tently enforced such reasonable accommodation. Believing that such reasonable accommodation is necessary in order to protect the religious freedom of its employee-citizens, the State of Michigan respectfully submits that the policies which underlie this enforcement are equally applicable to the instant case and that this Court should uphold the challenged statute.

The requirements of 42 USC § 2000e(j) do not violate the Establishment Clause and, according to the principles of statutory construction, the statute should be upheld. Allowing employees to remain gainfully employed while continuing to observe a Saturday Sabbath is a reasonable accommodation which is necessary to effectuate religious freedom and does not constitute an unconstitutional imposition on employers or unions.

ARGUMENT I

MICHIGAN HAS CONSISTENTLY ENFORCED REASONABLE ACCOMMODATION OF EMPLOYEES' RELIGIOUS OBSERVANCES, AND THIS STATE'S LONG HISTORY OF LEADERSHIP AND EXPERTISE IN THE AREA IS PERSUASIVE EVIDENCE OF THE VALIDITY OF ITS CONCLUSIONS REGARDING THE REASONABLE ACCOMMODATION REQUIREMENT.

On a matter of the complexity of that presented to the Court in the instant case, there are obviously many arguments to be made on each side of the issues raised by the Petition for Writ of Certiorari. This amicus has determined that these issues have been, and will be, exhaustively briefed by the parties and other amici. It is thus the intent of this brief to, for the most part, advise the Court as to the policy reasons for affirming the Court of Appeals for the Eighth Circuit and for upholding the principle of reasonable accommodation. Further, the brief will set forth the importance that the concept of individual rights has taken on in today's world, both in Michigan and the federal arena, particularly with respect to equal umployment opportunities, and the devastating impact an adverse decision herein will have on the freedom of Michigan employees, and employees throughout the country, to assert their civil right of freedom from religious discrimination in employment.

The State of Michigan has been traditionally known as a leader in the field of individual and civil rights. Its guarantees of individual freedoms have been reduced to writing since the time of the Northwest Ordinance. Its assurances of religious freedom have formed an important part of the jurisprudence of the state. Indeed, section 1 of the Michigan State Fair Employment Practices Act (FEPA), MCLA §423.301; MSA §17.458(1), declared in 1955, nine years

before there was a federal guarantee of equal employment opportunity, that: "The opportunity to obtain employment without discrimination because of race, color, *religion*, national origin, or ancestry is hereby *recognized as and declared to be a civil right*." (emphasis added) Further, section 3(a) of the FEPA in the same year prohibited religious discrimination in the hire, tenure, terms, conditions or privileges of employment, MCLA §423.303(a); MSA §17.458(3) (a).

Thus, freedom from religious discrimination in employment has been guaranteed in Michigan for over 20 years. The question this court must struggle with in the instant matter is what does that freedom mean? It is the position of the amicus that such religious freedom requires that employers and unions take into account the difficulties Sabbatarians encounter in practicing their religion while remaining gainfully employed.

Michigan's Constitution, Const 1963, art 5, §29 created the Michigan Civil Rights Commission (CRC) and charged it with the affirmative duty of securing equal protection of civil rights in the areas of religion, race, color, and national origin. The accompanying grant of authority to the CRC included not only the right to perform the usual administrative processing of complaints, but also the power, among others which will be mentioned, to conduct full evidentiary hearings on the merits with all the prerogatives incident thereto, a function the federal Equal Employment Opportunity Commission (EEOC) cannot perform.

On September 26, 1972, the CRC, in pursuit of its statutory and constitutional powers, adopted the EEOC's religious discrimination in employment guidelines. They basically required Michigan employers and unions to make reasonable accommodations to the religious needs of

employees, Interpretative Guidelines on Civil Rights Laws, 3 CCH Employment Practices Guide ¶24,235(B)(7), p 8635-7.

The CRC has been vigorously pursuing complaints from Michigan employees alleging religious discrimination in their employer's or union's failure to reasonably accommodate their religious needs. Four of these matters, not otherwise administratively resolved, have been brought before the CRC for adjudication. In each, the finding has been for the complaining employee; specifically that the employer's failure to make a reasonable accommodation entailed unlawful religious discrimination under Michigan law. Three of these determinations thus far have been taken to Michigan's circuit courts for review and/or retrial, although no Michigan court has yet ruled on the merits of these actions.

One of the above mentioned cases is of particular relevance to the matter before this Court. In *Michigan Department of Civil Rights, ex rel, Russell Taylor* v *Ford Motor Co*, Wayne County Circuit Court docket No. 76-601454-AA, the factual setting and issues are of unusual similarity to the instant cause. That matter involves a continuous operation as was true in *Hardison*, the conflict of a shift transfer with Sabbath observance, a low seniority employee, the question of overtime pay, breach of a collective bargaining contract's seniority provisions and an Establishment Clause challenge.

As can be seen, the *Taylor* v *Ford Motor* case is substantially on all fours with the case at bar and the Court's decision in this matter will very likely have a profound impact on the *Taylor* cause.

Similarly, the two other religious accommodation cases in Michigan's courts*, as well as those matters now pending before the CRC or advancing through the administrative process will undoubtedly be affected by this Court's decision. It is thus readily apparent that the instant matter potentially raises issues which will have a significant impact on the hire, tenure, terms, conditions or privileges of employment in Michigan. Each employee or potential employee in Michigan who observes a Saturday Sabbath, or some other Sabbath day or religious practice which conflicts with the usual work week schedule, will likely be in some way affected by this Court's ultimate ruling. The amicus is thus vitally concerned that the issues herein be properly resolved.

As has been emphasized, Michigan has historically been a leader in the area of enforcing freedom from religious discrimination in employment. It is therefore respectfully submitted that the position taken by a state with such an extensive record of protection of individual and civil rights is entitled to the most respectful consideration. Experience in a particular area leads to understanding, appreciation and an ability to analyze the needs of the citizenry. The following is presented to display Michigan's expertise in and commitment to the concept of individual rights.

The State of Michigan declares its public policy in its Constitution, statutes and judicial decisions, *Groehn* v *Corporation & Securities Commission*, 350 Mich 250; 86 NW2d 291 (1957). The public policy regarding individual rights has been consistently to protect them. Such is evidenced by the earliest pronouncements. The Northwest

*The amicus is not aware of other private actions in Michigan's courts which raise the religious accommodation issue. This is not to say, however, that there may not be such actions now pending.

Ordinance 1787, US Rev Stat, 2nd ed, 1878 p 13, art I, II and VI conferred many of the protections later contained in the United States Constitution's Bill of Rights. In 1800 the Northwest Territory was divided into two territories with the Michigan sector becoming part of the Indiana Territory, 2 US Stat, Ch XLI, pp 58-59. Section 2 of said Act preserved the rights conferred under the Northwest Ordinance.

Michigan became a separate territory in 1805, 2 US Stat, Ch V, pp 309-310. Section 2 of that Act secured the rights guaranteed by the Northwest Ordinance and of the Act which divided the Northwest Territory into separate territories. Further, the territory of Michigan agreed, in the preamble of its first Constitution, Const 1835, to form the State of Michigan.

Const 1835, art 1, §§1-4, 6-13 and 15-21 set forth an extensive bill of individual rights which embraced not only the guarantees of the federal Bill of Rights, but others as well. In particular, Const 1835, art 11, §1 prohibited slavery, a prohibition thenceforth continued constititutionally in Michigan. Various enabling provisions led to admission of Michigan as a state of the Union, 5 US Stat At Large 144, 5 US Stat At Large 59.

The State of Michigan in its 1850 Constitution expanded the individual rights conferred by its 1835 Constitution, Const 1850, art 4, §§39, 41-44; art 6, §§26-34; art 15, §15; and art 18, §§2, 7, 9-11 and 14. Const 1908 granted further individual rights to Michigan citizens, including a prohibition on the denial of the right to vote on account of sex, Const 1908, art 2, §§2-5, 7-17, 19-21; art 3, §1; art 11, §9; and art 13, §§1-3.

Finally, Michigan's 1963 Constitution reaffirmed rights then existing and significantly increased the protections and

privileges guaranteed to Michigan citizens, Const 1963, art 1, §§1-6, 8-18, 20-22; art 2, §1; art 4, §46; art 5, §29; art 8, §§2, 8 and art 10, §6. Const 1963 contained such notable provisions as a constitutional prohibition on the death penalty, which had been legislatively abolished since 1846 except for treason, Const 1963, art 4, §46; constitutional creation of the Michigan Civil Rights Commission, Const 1963, art 5, §29; and a prohibition on discrimination in education on account of religion, creed, race, color or national origin, Const 1963, art 8, §2.

The pattern established in Michigan has been to extend those protections deemed necessary to equal treatment of its inhabitants as the need became apparent. As discrimination has become more sophisticated in kind the statutory prohibitions were drafted in a more specific manner, and in addition offered relief for violations thereof, including most importantly, the services of a Michigan Civil Rights agency. Briefly summarized, for the Court's edification, are Michigan's statutory enactments regarding civil rights.

Discrimination in public accommodations has been prohibited in Michigan since the passage of 1885 PA 130, §2. The present provisions regarding this area are MCLA §§750.146, 750.147; MSA §§28.343, 28.344. Similarly, CL 1915, §8418, as amended, MCLA §35.461; MSA §4.1251, barred discrimination in public accommodations, conveyances and public amusement against persons in the military. Disqualification of citizens for jury service because of race or color was first prohibited by 1885 PA 130, §3 and currently encompasses the categories of race, creed or color, MCLA §750.148; MSA §28.345. MCLA §750.147a; MSA §28.344(1) prohibits discrimination in the extension of credit or determination of credit worthiness because of race, color, religion, national origin, marital status, sex or physical handicap.

The FEPA, which originally protected only against discrimination because of race, color, religion, national origin or ancestry, now encompasses the additional categories of age, sex and arrest record. MCLA §423.303a; MSA §17.458(3)(a), MCLA §423.303(e); MSA §17.458 (3)(e).

Discrimination in housing is prohibited in Michigan in the categories of race, color, religion, national origin, sex, marital status, age or handicap by the Fair Housing Act of 1968, MCLA §564.101 et seq.; MSA §26.1300(101) et seq.

Effective April 1, 1977, 1976 PA 453 repeals the FEPA and the Fair Housing Act of 1968. PA 453 prohibits discrimination in employment because of religion, race, color, national origin, age, sex, height, weight, or marital status; prohibits discrimination in public accommodations with respect to the classifications enumerated above except height and weight; prohibits discrimination by educational institutions as to religion, race, color, national origin or sex; and prohibits housing discrimination in the areas of religion, race, color, national origin, age, sex or marital status. Also effective on April 1, is the Michigan Handicappers Civil Rights Act, MCLA §37.1101 et seq.; MSA §3.550 (101) et seq., which affords equal opportunity in employment, housing, public accommodations, public services and educational facilities to persons with a physical or mental handicap. Each of the above described acts has been, or will be enforced by the Michigan Civil Rights Commission under the terms of existing legislation or those enactments effective as of April 1.

Michigan's legislative branch has obviously had substantial experience with civil rights. So too has its executive and judicial branches. The framers of Const 1963, for good and substantial reasons, accorded constitutional status to the CRC. The amicus herein, Michigan's Attorney General,

held as follows in OAG 1963-1964, No. 4161, pp 144-145 (July 22, 1963):

> From a plain reading of Article V, section 29, it is clear that the people have conferred plenary power upon the Civil Rights Commission in its sphere of authority as a constitutional commission to investigate and to secure the enjoyment of civil rights without discrimination. *Plec* v *Liquor Control Commission* (1948), 322 Mich 691.
>
> The authority of the Civil Rights Commission is limited only by the Revised Constitution and the Constitution of the United States. *State* v *Mountain States Telephone and Telegraph Company* (NM, 1950), 224 P. 2d 155.
>
> The grant of power in the Constitution carries with it by implication the authority to do all things necessary and appropriate to accomplish the purpose intended by the people. Thus the Civil Rights Commission created by the people in the Constitution is not limited to the powers expressly granted, and the Commission may exercise all powers necessary and essential in the performance of its duties.
>
> *Board of Supervisors of Atala County* v *Illinois Central Railroad Company* (Miss, 1939), 190 So 241; *Gavey* v *Trew* (Ariz, 1946), 170 P. 2d 845.
>
> * * *
>
> It must follow that within its sphere of authority the Civil Rights Commission is supreme in the exercise of the powers entrusted to it by the people.

As a result of its constitutional stature Michigan's Supreme Court has ruled that the CRC, in *Beech Grove Investment Co* v *Civil Rights Commission*, 380 Mich 405;

157 NW2d 213 (1968), was possessed of the authority to look to federal law as a source of the civil rights which it is charged with protecting. As the FEPA, *supra*, and Title VII's prohibitions on religious discrimination, 42 USC §2000e-2(a)(i), are set forth in substantially the same language, the *Beech Grove* rationale permits the CRC to look to federal law as a source of interpretation of the FEPA's religious discrimination prohibition. The CRC has taken the legal position that it may so look to federal law in interpreting Michigan civil rights law, Interpretative Guidelines on Civil Rights Laws, 3 CCH Employment Practices Guide, ¶24,235, p 8635-5. *Beech Grove* thus allows the CRC to adopt the definition of religion contained in the Civil Rights Act of 1964, 42 USC §2000e(j) (1972).

A further indication of Michigan's commitment to civil rights is displyed by two rulings of its highest court. In *Michigan Civil Rights Commission* v *Clark*, 390 Mich 717; 212 NW2d 912 (1973), the court said:

> . . . The CRC, just as the legislature, Governor and this Court, derives its powers directly from the people under the Constitution.
>
> The Legislature, although it may legislate with regard to the exercise of executive and judicial functions, may not prevent the executive or judicial branches from exercising their powers. *Similarly, the Legislature, although it may legislate with regard to the CRC, may not do so in a manner which prevents the CRC from functioning effectively.* (emphasis added) p 726

That concept was expanded in *City of Ypsilanti* v *Civil Rights Commission*, 393 Mich 253; 227 NW2d 213 (1974), when the Michigan Supreme Court, in overturning a Court of Appeals determination did so for the reasons set forth in

Court of Appeals Judge Danhof's dissent in *City of Ypsilanti* v *Civil Rights Commission*, 55 Mich App 103, 111; 221 NW2d 923 (1974). The rationale set forth was that the *courts and the legislature* should not act in a manner which prevents the CRC from functioning effectively.

The interpretations and actions of a state and its constitutionally-created civil rights organization, which possesses constititutional status and been viewed so affirmatively by the state's highest court and Attorney General should, it is respectfully submitted, be accorded substantial weight by this Court. The considerable experience Michigan possesses in the area qualified it as a state whose voice should be heeded. The fact of the CRC's adoption of the EEOC's religious accommodation guidelines, its decisions with respect thereto and its defending those decisions in the state's courts provide cogent reasons for validating the reasonable accommodation requirement. This is particularly true in light of Michigan's long experience with civil rights and its sensitivity to pockets of discrimination in employment which must be eliminated to achieve the goal of equal employment opportunity.

Also persuasive is the fact that eleven states other than Michigan have adopted the reasonable accommodation requirement in their respective state statutes or administrative regulations, Arizona 3 CCH Employment Practices Guide, ¶20,404 §41-1461.6, p 8128; Colorado, 3 CCH Employment Practices Guide, ¶21,063, p 8221-9; Illinois, 3 CCH Employment Practices Guide, ¶22,498, p 8418; Kansas, 3 CCH Employment Practices Guide, ¶23,079.01, §21-33-1(b), p 8503; Kentucky, 3 CCH Employment Practices Guide, ¶23,203, §344.030(5), p 8519; Maryland, 3 CCH Employment Practices Guide, ¶23,830, p 8567, Massachusetts, 3 CCH Employment Practices Guide, ¶24,005, §4 (1A) p 8586; New York, 3 CCH Employment

Practices Guide, ¶26,007, §296.10(b), p 8890; Ohio, 3 CCH Employment Practices Guide, ¶26,620, p 8952; Pennsylvania, 3 CCH Employment Practices Guide, ¶27,205A, pp 9027-9028; and South Dakota, 3 CCH Employment Practices Guide, ¶27,835.52, p 9145-9. Employers, employees and unions in each of the above states are undoubtedly struggling with the question of reasonable accommodation. It is clearly apparent that the interpretation of a statute by the agency charged with enforcing it is entitled to the most respectful consideration, *Griggs* v *Duke Power Co, infra*.

III

TRUE FREEDOM OF RELIGION REQUIRES A REASONABLE ACCOMMODATION OF AN EMPLOYEE'S OR PROSPECTIVE EMPLOYEE'S RELIGIOUS OBSERVANCES OR PRACTICES

A. THE UNITED STATES HAS HISTORICALLY ACCORDED EQUALITY OF OPPORTUNITY

The Court is of course quite familiar with the efforts of the United States regarding the freedom of its citizens. With a few unfortunate exceptions it has acted with one mind, respecting its constitution and statutes, in securing the rights of individuals. For the sake of perspective, the amicus will very briefly review the constitutional provisions affecting the freedom of Americans.

The historical setting at the time of ratification of the United States Constitution is well known. It then contained no Bill of Rights. The First Congress of the United States, in response to a national outcry thereto, submitted twelve amendments to the states for ratification. Ten of the twelve were accordingly ratified by the requisite three fourths of the

states and became effective. Of those ten, the first eight dealt specifically with protection of the rights of individuals. These amendments were an affirmation of the bills of rights of the individual states then in existence and in essence secured the citizenry against the excesses of government intrusion. Subsequent events revealed the Bill of Rights to be inadequate to accomplish the desired result of freedom for all Americans. It was thereafter deemed necessary to further amend the Constitution to secure additional individual rights. The specific amendments were US Const Amends XIII; XIV, §§1, 5; XV, XXIX; XXIV and XXVI.

These constitutional provisions proved to have shortcomings in effectively protecting the freedoms guaranteed thereby to Americans. For that reason federal civil rights statutes were enacted concerning substantially all endeavors. As this Court is intimately acquainted with such statutes, reference to same will not be made.

It is eminently clear that the United States of American has been and currently is concerned with the ability of its citizens to practice the freedoms granted to them. Of particular importance is freedom of religion as it was one of the cornerstones upon which this country was founded. It should be jealously guarded, particularly when one's employment threatenes to impinge upon it.

> . . . For the loss of a job because of discrimination means more than the loss of just a wage. It means the loss of a chance to learn. Discrimination is a vicious act. It may destroy hope and any trace of self-respect. That, and not the loss of pay, is perhaps the injury which is felt the most and the one which is the greatest.
>
> *Humphrey* v *Southwestern Portland Cement Co,* 369 F Supp 832, 834 (WD Tex, 1973), *rev'd on other grounds,* 488 F2d 591 (5th Cir, 1974) *reh den,* 490 F2d 992 (5th Cir, 1974)

B. THE EVEN-HANDED APPLICATION OF WORK RULES HAS A DISPROPORTIONATE EFFECT ON SABBATARIANS WHICH REQUIRES A REASONABLE ACCOMMODATION TO CURE

A conclusion can readily be drawn from the cases which have arisen on the subject of religious accommodation. An extensive review of the case law has revealed almost no suits involving Sunday Sabbath worshippers. It can reasonably be inferred therefore that the problem of employment in conjunction with a Sabbath work restriction falls disproportionately on Saturday Sabbath workers, a condition which *Griggs* v *Duke Power Co,* 401 US 424 (1971), declares to be a violation of Title VII. In most instances, the employment practice which results in discrimination against Sabbatarians is the result of an even-handed application of work rules. It was just such an even-handed application of an unemployment compensation policy which was struck down by the Court in *Sherbert* v *Verner,* 374 US 398 (1963). That case involved a Saturday Sabbath Observer who was refused unemployment benefits because of his refusal to work on Saturdays. The Court found that this unconstitutionally abridged the Sabbatarian's right to free exercise of his religion.

If the above stated conclusion is true, i.e. that Sunday Sabbath worshippers basically encounter no problems in working and practicing their religion, the fact that Sabbatarians do, requires affirmative action. The remedy to the evil of religious discrimination in employment which Sabbatarians have sustained is a reasonable accommodation to those employees' religious needs.

C. THE PRINCIPLES OF STATUTORY CONSTRUCTION DICTATE THAT 42 USC §2000e(j) BE UPHELD

Petitioner, Trans World Airlines, Inc., has urged on this Court the conclusion that a reasonable accommodation of Respondent Hardison would cause labor problems and violate the Establishment Clause. Analysis of these assertions leads one to the conclusion that the true question confronting the Court is, in reality, one of statutory construction.

One of the principles of statutory construction is that a statute should not be construed in such a manner as to render it partly ineffective or inefficient or to cause public injury or inconvenience, if another construction will make it effective, *United States of American* v *Powers*, 307 US 214 (1938). An adverse decision of this Court as to the validity of either the EEOC's religious discrimination guidelines or 42 USC §2000e(j) (the provisions of which are explained in the next paragraph) would render Title VII's general prohibitions against religious discrimination ineffective and would substantially injure Saturday Sabbath observers, as will be seen.

The EEOC's religious discrimination guidelines were first enacted in 1967, 29 CFR §1605. Title VII was amended in 1972 to incorporate the guidelines into the Act, 42 USC §2000e(j). Under these provisions, employers and labor unions have had an affirmative obligation to accommodate an employee's or prospective employee's religious observances or practices for over ten years. As the federal Court of Appeals decisions have been substantially in accord as to the requirement of such accommodation, and because relatively few suits have arisen, it must be assumed that there has been basic compliance with the requirement.

A reversal of the Court of Appeals for the Eighth Circuit would for the most part leave Sabbatarians, under the provisions of Title VII, without the ability to practice their religion and remain gainfully employed. It would assuredly make the Title VII general prohibition on religious discrimination ineffective and would possibly cause grave injury to Michigan employees, and employees throughout the nation. The construction given the reasonable accommodation requirement by the majority of federal courts (i.e. that an employer must make substantial efforts to make an accommodation) would make the statute effective as the *Powers* case, *supra*, requires.

1. A UNIFORM SYSTEM OF JURISPRUDENCE AS BETWEEN THE STATE AND FEDERAL SYSTEMS IS REQUIRED

There is another compelling reason for upholding the reasonable accommodation requirement. 42 USC §§ 2000e-5(c) and (d) require deferral by the EEOC to the state agency in any state which has a state law prohibiting the unlawful employment practice alleged to have been committed. The state agency may then proceed to act upon the Complaint of discrimination. After a sixty day deferral period the EEOC may proceed with the Complaint also. In the twelve states which require reasonable accommodation there is a very real possibility that determinations under state and federal law would be in direct conflict should 42 USC §2000e(j) or the EEOC's religious discrimination guidelines be voided by this Court. The purpose of the deferral provisions was to relieve the burden to the EEOC of employment complaints. The concept of deferral would make little sense if the state and federal civil rights organizations are not in accord. Much of the effectiveness of state civil rights agencies no doubt derives from the fact that an employer who does not

cooperate with the state must ultimately face the EEOC. Title VII was drafted to allow the EEOC to cooperate with state agencies, 42 USC §2000e-8(b). It is therefore obvious that Congress envisioned a uniform system of jurisprudence as between state and federal civil rights law. A construction of 42 USC §2000e(j), *supra*, which is not in harmony with the interpretations of state agencies would do substantial damage to the deferral concept and cooperation between the respective agencies.

2. THE ESTABLISHMENT CLAUSE IS NOT VIOLATED BY AN ACCOMMODATION REQUIREMENT

There is another principle of statutory construction which is applicable herein. In *United States* v *Thirty-Seven Photographs*, 402 US 363, 369 (1971), the Court in quoting *Crowell* v *Benson*, 285 US 22, 62 (1932), stated that:

> ' . . . [w]hen the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided . . . . '

It is thus appropriate to consider the Establishment Clause question at this juncture. The amicus respectfully asserts that a reasonable accommodation requirement does not violate US Const, amend 1.

In *Zorach* v *Clauson*, 343 US 306 (1952) the Court held that:

> . . . Government may not finance religious groups nor undertake religious instruction nor blend secular and

> sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here. p 314

In the instant case, to do nothing is to favor the Sunday Sabbath of the majority Christians, and to accommodate Sabbatarians is to maintain government neutrality as to the Sabbaths of the various religions. Accommodation does not favor Sabbatarians' beliefs over the beliefs of others. It treats them equally. The failure to accommodate favors the believers in the Sunday Sabbath.

In *Zorach*, Mr. Justice Douglas explained the relationship between church and state under the First Amendment:

> . . . The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire

protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; so help me God in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act. pp 312-313

The Court in *School District of Abingdon Twp, Pa* v *Schempp*, 374 US 203, 222 (1963) a school prayer and Bible

reading case, said as follows in determining whether legislation violates the Establishment Clause:

> . . . The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. [citations omitted]

In the instant case, it is submitted that the required secular legislative purpose and primary effect which neither advances nor inhibits religion is present and that is the removal of employment discrimination — in this case religious discrimination in employment. The Court, in *Schempp*, continued by opening that:

> . . . The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion . . . . pp 222-223

This is precisely what accommodation in the instant case accomplishes. The failure to accommodate restrains Hardison's free exercise of his religious beliefs. Accommodation enables him to exercise his religious beliefs as freely as the Sunday Sabbath worshipper.

Also to be considered is the problem of entanglement between the church and state. The only possible entanglements, when considering a question of reasonable accommodation are interactions between the employer and employee. *Lemon* v *Kurtzman*, 403 US 602 (1971) *reh den*, 404 US 876 (1971) is enlightening. It was there said:

> Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable . . . . p 614

The only possible entanglement between church and state in imposition of an accommodation requirement is that an analysis of an employee's religious needs by the appropriate civil rights organization or the courts may be required. Interactions of this type are truly not of the nature of those prohibited by the Constitution. The Supreme Court's decisions with respect to entanglement have involved such things as the tax exempt status of churches, *Walz* v *Tax Commission of the City of New York*, 397 US 604 (1970); state salary supplements for parochial school teachers, *Lemon* v *Kurtzman*, *supra;* a federal construction grant to a religious educational facility, *Tilton* v *Richardson*, 403 US 672 (1971); *reh den*, 404 US 874 (1971); state assistance to church-related schools in the performance of their secular functions, *Norwood* v *Harrison*, 413 US 455 (1973); and state reimbursement for costs of state mandated testing and recordkeeping, *Levitt* v *Committee for Public Education & Religious Liberty*, 413 US 472 (1973). These are simply not of the manner of entanglement which would occur herein.

The entanglement test suggested by *Lemon*, *supra*, is to the following effect:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority . . . . p 615

The institutions benefited by enforcement of an accommodation requirement are the civil rights organizations which are enabled thereby to eliminate some of the religious discrimination in employment. In a very indirect manner the churches may benefit. Suppose, for instance, that an employee wishes to be excused from work to attend church. The accommodation of the employee's religious needs does not result in increased church attendance but rather leaves the option of attendance with the worshipper. This accomplishes the desired end of government neutrality toward religion. The aid provided by the state would be the elimination of employment discrimination. The resulting relationship between government and religion is so slight as to be negligible. It does not approach the entanglement forbidden by the Constitution.

III

REASONABLE ACCOMMODATION REQUIRES NO MORE THAN THE SAME ARRANGEMENTS MADE TO COMPENSATE FOR THE ABSENCE OF AN EMPLOYEE FOR ANY REASON

The manner in which the question of reasonable accommodation is most frequently conceived is that it requires a special favor or arrangement to an employee because of his or her religion. At first blush this may seem to be the true state of events. However, placed in its proper perspective, this question takes on a totally different character.

Petitioner, Trans World Airlines, Inc., has essentially pleaded throughout the instant cause that the problem of releasing an employee for religious reasons has special significance and requires a unique solution. First, the standard of reasonable accommodation is only required in the event that it can be accomplished without undue hardship on the conduct of the employer's business, 42 USC §2000e(j). This provision provides a valid defense to the employer should the accommodation amount to an undue hardship. It involves a simple question of proof. It is a legal determination based on the facts in existence.

What the amicus objects to, and the reason behind the employee's or prospective employee's grievance over an employer's accommodation efforts, is the arbitrariness of the decision not to accommodate. The case law indicates that employers, when faced with a religious accommodation question, quite often resort to a hard-nosed attitude. The proper perspective in which to view reasonable accommodation problems is that they are the same as any other absence from one's employment. It is true that the same employee is not off work once a week because of a reason such as sickness but the replacement of a Sabbatarian is no different than the replacement for any other reason and there simply are not that many Sabbatarians to be accommodated.

If an analogy is drawn between an absence for religious reasons and an absence for any other reason it will be seen that reasonable accommodation of employees is possible within the terms of any union contract. All collective bargaining agreements must provide for replacement of employees when there is an absence because of vacation, sickness, accident, long-term disability, personal leave or a no-show. The same way in which these absences are covered could be done to accommodate an employee's religious observance.

Employers, when confronted with such an argument most often respond that employees will want Tuesdays, Wednesdays and other days off for religious observance. The cases have shown that such a result has not materialized. If it does, the employer can plead and prove undue hardship.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

FRANK J. KELLEY
Attorney General
State of Michigan

Attorney for Amicus

525 W. Ottawa
Law Building, 7th Floor
Lansing, Michigan 48913

Dated: January 25, 1977